No. 9007

# In the United States Circuit Court of Appeals

## For the Ninth Circuit.

BETTY ROGERS,

*Petitioner,*

*vs.*

COMMISSIONER OF INTERNAL REVENUE,

*Respondent.*

and

BETTY ROGERS, O. N. BEASLEY, OSCAR LAWLER, JAMES K. BLAKE, Executors of the Estate of Will Rogers, Deceased,

*Petitioners,*

*vs.*

COMMISSIONER OF INTERNAL REVENUE,

*Respondent.*

## PETITIONERS' OPENING BRIEF.

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## PETITIONERS' OPENING BRIEF.

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### Jurisdictional Statement.

This is a consolidated appeal from a final order of the United States Board of Tax Appeals in two appeals affirming the action of the Commissioner of Internal Revenue in determining deficiencies for the calendar year 1933 against petitioner Betty Rogers in the sum of $17,055.90 and against petitioner Betty Rogers, O. N. Beasley, Oscar Lawler, James K. Blake, executors of the Estate of Will Rogers, deceased, in the sum of $16,894.61. [R. 46, 47.]

On March 4, 1936, in accordance with the provisions of Section 272(a) of the Revenue Act of 1932, as amended by Section 501 of the Revenue Act of 1934, the Commissioner of Internal Revenue, respondent herein, notified petitioners that the determination of petitioner Betty Rogers' and the decedent Will Rogers' income tax liability for the year 1933 disclosed the above mentioned deficiencies. [R. 11, 24.] From these determinations petitioners duly filed their appeals to the United States Board of Tax Appeals, in accordance with the provisions of said Section 272(a) of the Revenue Act of 1932 as amended by Section 501 of the Revenue Act of 1934. Said appeals were given docket number 84895 in the case of the appeal of Betty Rogers, petitioner, and docket number 84896, in the case of the appeal of Betty Rogers, O. N. Beasley, James K. Blake and Oscar Lawler, executors of the Estate of Will Rogers, deceased, petitioners.

Said appeals were called for hearing by the United States Board of Tax Appeals on September 27, 1937 at Los Angeles, California. [R. 2, 4.] At said hearing upon motion of counsel, it was ordered that said appeals be consolidated for the purpose of hearing and argument. Stipulations of facts were filed at said hearing, and these stipulations containing all the evidence to be presented, the appeals were submitted to the Board of Tax Appeals for decision. [R. 2, 4.]

On May 18, 1938, the Board of Tax Appeals promulgated its findings of fact and opinion in said appeals [R. 31] and on May 19, 1938, the Board of Tax Appeals entered its decisions and final orders determining deficiencies in petitioner Betty Rogers' income tax for the year 1933 in the amount of $17,055.90 and in decedent Will Rogers' income tax for said year 1933 in the amount of $16,894.61. [R. 46, 47.]

Petitioners being individuals, residing in California, and the income tax returns of petitioner Betty Rogers and decedent Will Rogers having been filed with the Collector of Internal Revenue for the Sixth District of California at Los Angeles, California, the appeals from the decisions and orders of the Board of Tax Appeals were brought to this Court. Separate petitions for review were filed on August 13, 1938 pursuant to the provisions of Section 1001-1003 of the Revenue Act of 1926, as amended by Section 603, Revenue Act of 1928, and Section 1101 of the Revenue Act of 1932, and Section 519 of the Revenue Act of 1934. [R. 47, 56.]

On September 19, 1938, this Court made its order consolidating the appeals herein for briefing, hearing, argument and decision upon a single consolidated transcript of record. [R. 89.]

## Statement of Facts.

There is but one issue involved in this consolidated appeal, the facts in regard to which were stipulated by the parties before the Board of Tax Appeals, substantially identical Stipulations of Facts having been filed, in the two appeals before the Board and incorporated in the Statement of Evidence approved by the Board as part of the record in this consolidated appeal. [R. 64, *et seq.*]

Petitioners are individuals residing in the County of Los Angeles, State of California, and petitioners Betty Rogers, O. N. Beasley, Oscar Lawler and James K. Blake are the duly appointed, qualified and acting executors of the Estate of Will Rogers, deceased. [R. 66.] Decedent Will Rogers, a resident of the City of Beverly Hills, California, died testate on August 15, 1935 [R. 66] and on September 17, 1935, petitioners were appointed

executors of his estate. [R. 66.] During September, 1927 petitioner Betty Rogers and her husband, decedent Will Rogers, purchased from Oren B. Waite certain real property in the County of Los Angeles, State of California, described as lots 163 and 164, tract 1719, as per map recorded in book 21, pages 162 and 163 of maps in the office of the County Recorder of Los Angeles County. [R. 67.] The total purchase price of this property was $105,000.00 payable as follows: $15,000.00 cash at the time of the purchase, the assumption of a note in the amount of $52,000.00, which note was secured by a mortgage on the property and became due and payable in 1930, and the giving of a promissory note for the balance to be secured by a trust deed on the property. [R. 67.]

In September, 1927, petitioner Betty Rogers and her husband Will Rogers paid the $15,000.00 cash and assumed payment of the $52,000.00 note. [R. 67.] Also in September, 1927 petitioner and her husband executed to the seller, Oren B. Waite, their promissory note in the amount of $38,000.00, which note was made payable to Oren B. Waite or his order, was dated August 19, 1927 and provided for the payment of interest at the rate of 7 per cent per annum. [R. 67-68.] The note was payable on or before August 19, 1932. Accordingly the above described property was conveyed to petitioner and her husband, subject to the mortgage for $52,000.00, and immediately thereafter petitioner and her husband conveyed the property to the Title Guarantee and Trust Company, as trustee, to be held in trust for the payment of the promissory note in the amount of $38,000.00. [R. 68.] The deed of trust by which this promissory note of $38,000.00 was secured is set forth in full in the record in this appeal at page 72. This property was acquired by Will Rogers

and his wife, petitioner Betty Rogers, as community property. [R. 68.] It was business property and the acquisition thereof by Mr. and Mrs. Rogers was a transaction entered into for profit. [R. 68.] Prior to 1933 Mr. and Mrs. Rogers paid in full the note in the amount of $52,000.00 which had been assumed by them at the time of the purchase of the property. [R. 68.] Also prior to 1933 the $38,000.00 note payable to Oren B. Waite and the beneficial interest under the deed of trust which secured said note had been transferred and assigned to the California Trust Company. [R. 69.] On August 19, 1932 this note in the amount of $38,000.00 became due and payable. [R. 69.] It was not paid on the due date and on August 25, 1932 payment of said note and the interest accrued thereon was demanded of Mr. and Mrs. Rogers and notice was given that unless the principal and interest were paid, the holder of the note would proceed to enforce its rights under the provisions of the deed of trust given to secure payment of the indebtedness. [R. 69.]

Thereafter it was agreed by and between decedent Will Rogers and petitioner Betty Rogers and the holder of the $38,000.00 note and trust deed that the property be conveyed by decedent and his wife to the holder of the note and that the note be cancelled and surrendered. Thereafter the property was reconveyed by Title Guarantee and Trust Company, the trustee in the deed of trust which secured said $38,000.00 note to petitioner and her husband, and on April 21, 1933, they conveyed the property to the California Trust Company and the note in the amount of $38,000.00 was surrendered and cancelled. The deed by which the conveyance was made is set forth in full at page 81 of the record.

Before the relinquishment of their interest in the property and the cancellation and surrender of their note, peti-

tioner Betty Rogers and her husband had paid $67,000.00 toward the purchase price of the property and, in addition thereto, had paid escrow expenses in the amount of $212.02. [R. 70.] For the years 1927 to 1932 inclusive, petitioner Betty Rogers and her husband had claimed and were allowed depreciation on the improvements on this property in the total amount of $13,156.77. [R. 70.] Thus the total unrecovered cash investment in the property was $54,055.25. [R. 70.] Therefore, Will Rogers and Betty Rogers each sustained a loss in the year 1933 from the transaction in the amount of $27,027.62. [R. 70.]

Will Rogers and Betty Rogers filed separate income tax returns for the year 1933. [R. 70.] Each of these returns were filed with the Collector of Internal Revenue for the Sixth District of California at Los Angeles, California. [R. 70, 84.] In his return for said year, Will Rogers computed a loss on this transaction in the amount of $57,643.46 and deducted one-half of this sum or $28,821.73 as an ordinary loss under the provisions of Section 23(e) of the Revenue Act of 1932, in computing his net taxable income for said year. [R. 71.] Petitioner Betty Rogers likewise computed a loss on this transaction in the amount of $57,643.46 and deducted one-half of the sum or $28,821.73 as an ordinary loss under the same section of the same Revenue Act. Respondent reduced the amount of the total loss of Will Rogers and Betty Rogers to $54,055.25 and further determined that the loss was a capital loss within the meaning of Section 101 of the Revenue Act of 1932 and treated this loss as a capital loss in recomputing the tax liability of petitioner Betty Rogers and decedent Will Rogers for that year.

The deficiencies here in controversy result from respondent's determination that the loss suffered was a capital

one [R. 71] and therefore the sole question or issue before this Court to determine is whether or not, under the facts above stated, the loss suffered can be said as a matter of law to be an ordinary or a capital loss within the meaning of the applicable sections of the Revenue Act of 1932.

## Specifications of Error.

1. The Board of Tax Appeals erred in finding and determining that the loss suffered by petitioner Betty Rogers and decedent Will Rogers in the transaction culminating in their relinquishment of their equity in real property to the seller of such property in payment of the remaining portion of the purchase price and their forfeiture of the purchase price payments already made constituted a capital loss rather than an ordinary loss. (Assignments of Error 1-5, inclusive, Docket No. 84895 [R. 51-53] and Assignments of Error 1-5, inclusive, Docket No. 84896 [R. 60-62]. These assignments are set forth in full immediately preceding Argument.)

## Summary of Argument.

(a) The loss suffered in the instant case was not a capital loss for the reason that it did not result from the sale or exchange of a capital asset.

(1) Payment of an obligation does not result in a sale or exchange.

(2) In order for there to have occurred a sale or exchange, parties to any transaction must receive something of exchangeable value.

(b) The decision of the Board of Tax Appeals in the case at bar is inconsistent with and contrary to its recent decisions where taxpayers have lost property by foreclosure or transactions in lieu of foreclosure.

## ARGUMENT.

**Assignments of Error—Docket No. 84895:**

1. The United States Board of Tax Appeals erred in ordering a deficiency in petitioner's income tax for the calendar year 1933 in the amount of $17,055.90. [R. 51.]

2. The United States Board of Tax Appeals erred in deciding that the loss sustained by petitioner in the year 1933 on reconveyance of the property in question in payment and cancellation of her and her husband's liability on their outstanding note leaving unrecovered a cash investment in the property in the amount of $27,027.62 was a capital loss for income tax purposes for the reason that as a matter of law the loss occurring under such circumstances constituted an ordinary loss under the applicable Revenue Act. [R. 51.]

3. The United States Board of Tax Appeals erred in holding that the loss sustained by a purchaser of real property upon reconveyance of said property to cancel the balance due on the purchase money note and forfeiture of prior cash payments, constituted a capital rather than an ordinary loss under the Revenue Act of 1932. [R. 52.]

4. The United States Board of Tax Appeals erred as a matter of law in deciding that the reconveyance of purchased premises, subject to a trust deed given to secure the payment of a purchase money note, in cancellation of

the indebtedness thereon, constituted a sale of a capital asset, the loss suffered from the sale of which was a capital loss. [R. 52.]

5. The United States Board of Tax Appeals erred in ordering that petitioner was not entitled to deduct for income tax purposes an ordinary loss in the amount of $27,027.62 in the calendar year 1933 by reason of the reconveyance of certain property, which she had purchased and which was subject to a trust deed to secure the payment of the remainder of the purchase price, and forfeiture of the cash purchase price theretofore paid thereon, for the reason that such order of the United States Board of Tax Appeals is contrary to the facts stipulated by the parties to this proceeding and the law applicable thereto. [R. 52.]

**Assignments of Error—Docket No. 84896:**

1. The United States Board of Tax Appeals erred in ordering a deficiency income tax of Will Rogers, deceased, for the calendar year 1933 in the amount of $16,894.61. [R. 60.]

2. The United States Board of Tax Appeals erred in deciding that the loss sustained by Will Rogers, deceased in the year 1933 on reconveyance of the property in question in payment and cancellation of his and his wife's liability on their outstanding note leaving unrecovered a

cash investment in the property in the amount of $27,-027.63, was a capital loss for income tax purposes for the reason that as a matter of law the loss occuring under such circumstances constituted an ordinary loss under the applicable Revenue Act. [R. 60.]

3. The United States Board of Tax Appeals erred in holding that the loss sustained by a purchaser of real property upon reconveyance of said property to cancel the balance due on the purchase money note and forfeiture of prior cash payments constituted a capital rather than an ordinary loss under the Revenue Act of 1932. [R. 61.]

4. The United States Board of Tax Appeals erred as a matter of law in deciding that the reconveyance of purchased premises subject to a trust deed given to secure the payment of a purchase money note, in cancellation of the indebtedness thereon constituted a sale of a capital asset, the loss suffered from the sale of which was a capital loss. [R. 61.]

5. The United States Board of Tax Appeals erred in ordering that Will Rogers was not entitled to deduct for income tax purposes and ordinary loss in the amount of $27,027.63 in the calendar year 1933 by reason of the reconveyance of certain property which he had purchased and which was subject to a trust deed to secure the payment of the remainder of the purchase price and forfeiture of the cash purchase price theretofore paid thereon, for the reason that such order of the United States Board of Tax Appeals is contrary to the facts stipulated by the parties to this proceeding and the law applicable thereto. [R. 61.]

(a) The Loss Suffered in the Instant Case Was Not a Capital Loss for the Reason That It Did Not Result From the Sale or Exchange of a Capital Asset.

1. Payment of an Obligation Does Not Result in a Sale or Exchange.

It is believed that the issue involved in this case, as it is defined by the specific facts, is one which has never been passed upon by the Courts or the Board of Tax Appeals in any instance other than the decision in these cases before the Board of Tax Appeals. However, the underlying principle disclosed by an analysis of these facts is not new and has been decided by the Courts and the Board of Tax Appeals in cases so analogous to the instant case as to be indistinguishable. Such decisions have been in accord with petitioner's contentions.

A brief summary of the events which define the present issue shows that the taxpayers (petitioner Betty Rogers and decedent Will Rogers) entered into a contract of purchase of real property, paying for the property a substantial amount in cash and assuming the liability for payment of an already existing encumbrance and executing a note secured by a trust deed to the seller for the balance of the purchase price. The purchase price, with the exception of the note in favor of the seller, was paid before August, 1932. At that time the note in favor of the seller came due but was not paid. Suit was threatened and thereafter, in order to pay the obligation, the taxpayers relinquished their equity in the property to the sellers' assignees in return for the cancellation of their indebtedness, suffering as a loss the entire purchase price already paid. The amount of the loss suffered is not in question in this case, the sole question for determination

being whether as a matter of law the taxpayers' loss should be treated as an ordinary loss, as petitioners contend, or whether it should be treated as a capital loss as is urged by the respondent.

The sections of the Revenue Act of 1932 which pertain to a determination of the above question, are as follows:

"Section 23. Deductions from Gross Income.

"In computing net income there shall be allowed as deductions:

* * * * * * * * *

"(e) Losses by Individuals.—Subject to the limitations provided in subsection (r) of this section, in the case of an individual, losses sustained during the taxable year and not compensated for by insurance or otherwise—

* * * * * * * * *

"(2) If incurred in any transaction entered into for profit, though not connected with the trade or business;" * * *

"Sec. 101. Capital Net Gains and Losses.

* * * * * * * * *

"(b) Tax in Case of Capital Net Loss.—In the case of any taxpayer, other than a corporation, who for any taxable year sustains a capital net loss (as hereinafter defined in this section), there shall be levied, collected, and paid, in lieu of all other taxes imposed by this title, a tax determined as follows: a partial tax shall first be computed upon the basis of the ordinary net income at the rates and in the manner as if this section had not been enacted, and the total tax shall be in this amount minus 12½ per

centum of the capital net loss; but in no case shall the tax of a taxpayer who has sustained a capital net loss be less than the tax computed without regard to the provisions of this section.

"(c) * * *

"(2) 'Capital loss' means deductible loss resulting from the sale or exchange of capital assets."

* * * * * * * * *

"(8) 'Capital Assets' means property held by the taxpayer for more than two years (whether or not connected with his trade or business), but does not include stock in trade of the taxpayer or other property of a kind which would properly be included in the inventory of the taxpayer if on hand at the close of the taxable year, or property held by the taxpayer primarily for sale in the course of his trade or business." * * *

It is clear from a reading of the statutes above quoted that the loss suffered by the taxpayers in the case at bar is one which is deductible for income tax purposes since it resulted from a transaction entered into for profit. [R. 68, 84.] (Sec. 23 (e) (2).) It is likewise clear by the definition contained in the statute itself that the loss cannot be treated as a capital loss for income tax purposes unless it resulted "from the sale or exchange of capital assets".

Petitioners submit that the series of events at the culmination of which petitioner Betty Rogers and decedent Will Rogers had nothing which they did not have at the commencement of the transaction, but were concededly out of pocket to the extent of some $54,000.00, did not constitute such sale or exchange.

It is a familiar tenet of the law, repeatedly reiterated by the Courts, that in interpreting taxing statutes the language should be taken in its ordinary meaning. (*Hale v. Helvering,* 85 Fed. (2d) 819 (C. A. D. C.—1936); *John H. Watson v. Commissioner, 27* B. T. A. 463 (1932).) This rule has been stated by the United States Supreme Court in *Old Colony R. R. Co. v. Commissioner,* 284 U. S. 552, 560, 52 Sup. Ct. 211, 76 L. Ed. 484, as follows:

> "The rule which should be applied is established by many decisions. 'The legislature must be presumed to use words in their known and ordinary signification.' Levy v. M'Cartee, 6 Pet. 102, 110, 8 L. ed. 334, 337. 'The popular or received import of words furnishes the general rule for the interpretation of public laws.' Maillard v. Lawrence, 16 How 251, 261, 14 L. ed. 925, 930. And see United States v. Buffalo Natural Gas Fuel Co., 172 U. S. 339, 341, 43 L. ed. 469, 470, 19 S. Ct. 200; United States v. First Nat. Bank, 234, U. S. 245, 258, 58 L. ed. 1298, 1303, 34 S. Ct. 846; Caminetti v. United States, 242 U. S. 470, 485, 61 L. ed. 442, 452, L. R. A. 1917F, 502, 37 S. Ct. 192, Ann. Cas. 1917B, 1168. As was said in Lynch v. Alworth-Stephens Co., 267 U. S. 364, 370, 69 L. ed. 660, 662, 45 S. Ct. 274, "the plain, obvious and rational meaning of a statute is always to be prefered to any curious, narrow, hidden sense that nothing but the exigency of a hard case and ingenuity and study of an acute and powerful intellect would discover.' This rule is applied to taxing acts: De Ganay v. Lederer, 250 U. S. 376, 381, 63 L. ed. 1042, 1044, 39 S. Ct. 524."

Quoting and applying this rule, the Court of Appeals for the District of Columbia in *Hale v. Helvering, supra,* has held that an ordinary as distinguished from a capital

loss was sustained in the following situation. During the year 1925 the Hale brothers sold an orange grove for the sum of $60,000.00. Title was transferred to the purchaser upon payment of $20,000.00 in cash and $40,000.00 in notes secured by a first mortgage. The brothers each reported their pro-rata share of the profit on the transaction in 1925 and paid the tax due thereon. Upon maturity of the notes in 1927, the maker, although financially able, refused to pay. During the year 1929 suit was commenced to collect the notes. Prior to judgment a settlement was entered into which resulted in loss to each of the Hale brothers of approximately $7,500.00. The Commissioner refused to allow the deduction of such loss by the Hale brothers as a capital loss, but asserted that it was allowable only as a bad debt. In determining that the loss suffered was not a capital loss for the reason that it did not arise from the sale or exchange of a capital asset, the Court states:

> "There was no acquisition of property by the debtor, no transfer of property to him. Neither businessmen nor lawyers call the compromise of a note a sale to the maker. In point of law and in legal parlance, property in the notes as capital assets was extinguished, not sold. In business parlance, the transaction was a settlement and the notes were turned over to the maker, not sold to him."
>
> *Hale v. Helvering*, 85 Fed. (2d) 819, 821.

Thus it appears that a loss suffered by mortgagee in a transaction similar to the one in the case at bar has been held not to result in capital loss. It would seem incredible

that a different rule should apply when it is the mortgagor who suffers the loss as in the instant case. What was actually accomplished in *Hale v. Helvering,* and likewise in the case at bar, as well as in certain other Court and Board cases to be hereinafter discussed, was that a debt existing between two persons standing in the position of debtor and creditor was satisfied and paid.

It has frequently been held by the Courts and the Board of Tax Appeals that the payment of a debt does not constitute a sale or exchange of property and, therefore, does not result in capital gain or loss.

In *John H. Watson, Jr. v. Commissioner,* 27 B. T. A. 463 (1932), it was held that the payment at maturity of the face amount of bonds purchased at a premium was not a sale or exchange resulting in a capital loss.

Again in *George A. Hellman, Commissioner,* 33 B. T. A. 901 (1936), it was held that the gain realized upon the surrender of combined insurance and annuity policies was taxable as ordinary income and could not be treated as capital gain for the reason that such surrender did not constitute a sale or exchange. So also in *United States v. Fairbanks,* 95 Fed. (2d) 794 (C. C. A. 1938), decided just this year by this Court and citing and following the *John H. Watson, Jr.* case, *supra,* it was held that the gain realized on the redemption of debenture bonds was not a capital gain but an ordinary one.

The principle upon which all of the above cited cases were decided was the same; namely, that the payment of an obligation does not effect a sale or exchange and that therefore the gain or loss on such disposition of the asset affected cannot be a capital one. The cases holding in

accord with this principle are legion, among which are: *Arthur E. Braun v. Commissioner*, 29 B. T. A. 1161 (1934); *Ernest W. Brown v. Commissioner*, 36 B. T. A. 182 (1937); *Felin v. Kyle*, 22 Fed. Supp. 556 (D. C. Pa. 1938). Interestingly enough respondent appears to agree with this principle and it is submitted that the position he takes in the instant case is inconsistent. Respondent gave notice of his acquiescence in the case of *John H. Watson, Jr., supra,* and in the other cases above cited where there was a gain instead of a loss involved, he was successful in his contention that the capital gain rates were not applicable. Therefore, applying this principle to the case at bar, it is apparent that there can have been no sale or exchange, since the petitioner Betty Rogers and her husband by relinquishing their equity merely paid their obligation.

2. In Order for There to Have Occurred a Sale or Exchange, Parties to Any Transaction Must Receive Something of Exchangeable Value.

Furthermore, for another reason, which has been held by the Courts to negative the existence of a sale or exchange, there can be said to have occurred no sale or exchange in the case at bar. An essential element of a sale or exchange is that something of exchangeable value be received by the parties to the transaction. This principle was recognized and relied upon in the recent holding of this Court in *Chester N. Weaver Co. v. Commissioner*, 97 Fed. (2d) 31 (C. C. A. 9th 1938), wherein this Court held that a taxpayer surrendering its preferred stock and receiving a liquidating dividend could deduct as a loss the

difference between the amount paid for the stock and the amount of the dividend as against the contention that loss was from an exchange of stock and was not deductible because taxpayer had no capital gains against which to offset such loss. The opinion states: "A 'sale or exchange' implies, we think, that each party to the transaction shall obtain something".

Such also was the opinion of the Circuit Court of Appeals for the Fifth Circuit in *Dallas Transfer & Terminal Warehouse Co. v. Commissioner,* 70 Fed. (2d) 95 (1934), wherein the Court decided that a taxpayer realized no income when it transferred to its lessor property of a value of some $17,500 in return for the cancellation of its obligation in the amount of approximately $108,000.00. The Court states:

> "The transaction was not in form or substance a sale for $107,880.77 of property which had an appraised value of $17,507.20. * * * Taxable income is not acquired by a transaction which does not result in the taxpayer getting or having anything he did not have before. Gain or profit is essential to the existence of taxable income. A transaction whereby nothing of exchangeable value comes to or is received by a taxpayer does not give rise to or create taxable income."

Applying this principle to the instant case, it appears that petitioner Betty Rogers and her husband received nothing of exchangeable value in the course of the events under consideration here. At the culmination of the entire transaction Mr. and Mrs. Rogers had actually lost some $54,000 in money paid out and received nothing for it.

(b) The Decision of the Board of Tax Appeals in the Case at Bar Is Inconsistent and Contrary to Its Recent Decisions Where Taxpayers Have Lost Property by Foreclosure or Transactions in Lieu of Foreclosure.

By a series of recent decisions by the Board of Tax Appeals commencing with *Commonwealth, Inc. v. Commissioner,* 36 B. T. A. 850 (1937), and continuing with *Godfrey S. Hammel v. Commissioner,* 36 B. T. A. 1331 (1937); *H. L. Rust, Jr. v. Commissioner,* 38 B. T. A. ....., No. 115 (Oct. 18, 1938, Docket No. 89171), Commerce Clearing House, Dec. No. 10,467, and *C. Griffith Warfield v. Commissioner,* 38 B. T. A. ....., No. 114 (Oct. 18, 1938, Docket No. 89170), Commerce Clearing House, Dec. No. 10,466, the Board of Tax Appeals has determined with regard to loss on mortgage transactions inconsistent with its holding in the case at bar as follows: In *Commonwealth, Inc., supra,* the facts were that the petitioner had purchased property subject to a mortgage. When the note secured by the mortgage became due and was not paid, the petitioner in lieu of suffering foreclosure proceedings conveyed its equity to the mortgagee. The Board held that the petitioner suffered ordinary loss as distinguished from a capital loss to the extent of the purchase price paid prior to the conveyance.

In *Godfrey S. Hammel, supra,* the petitioner was the mortgagor of property which was foreclosed and sold at sheriff's sale. The Board held that the loss suffered by the mortgagor in this instance was an ordinary loss, as distinguished from a capital loss. Such likewise was the

holding in cases of *H. L. Rust, Jr., supra,* and *C. Griffith Warfield, supra.* In each of these cases the Board looked at the true facts of the situation and determined that no sale or exchange had taken place. Thus an anomalous condition of the law with regard to this subject is presented by these cases and the instant case.

1. Where a mortgagor loses property by foreclosure, the loss suffered by him is deemed an ordinary loss. (*Godfrey S. Hammel, supra.*)

2. Where a person, not the original mortgagor, abandons property to the mortgagee in lieu of suffering foreclosure proceedings, the loss suffered by him is likewise deemed to be an ordinary loss.

3. And yet in the case where substantially no different result is reached, that is, where the mortgagor of property abandons the property to the mortgagee, the loss according to the Board of Tax Appeals' opinion in the instant case is deemed to be a capital loss.

Viewed from a practical point of view, it seems that what actually happened in the instant case was that Mr. and Mrs. Rogers merely abandoned the property which they started to purchase in lieu of submitting to foreclosure proceedings. Certainly the loss in this situation is just as real and of the same type or character as the loss in the situation where property is taken by foreclosure and to assert that there is no sale or exchange on a mortgage foreclosure, but that there is one on a voluntary abandonment to a mortgagee in lieu of foreclosure seems indicate a distinction without a difference. To follow

through the contentions of respondent to their logical conclusion, it appears that a man about to lose his property on foreclosure must necessarily resist foreclosure and have the case go to Court and be determined there and thereby put himself to additional expense and entail additional loss in order that the loss which he is bound to suffer may be deemed an ordinary loss instead of a capital loss. Viewed in this light the contentions of the respondent appear incredible and such a situation demonstrates clearly how out of line with the existing law are such contentions.

In conclusion, it is submitted that by reason of the fact that there was present in the instant case merely the payment of a debt, and, therefore, no sale or exchange, and further that a holding for the respondent in the instant case would be contrary to the existing law with regard to mortgage foreclosures and transactions in lieu of foreclosure, the decisions of the Board of Tax Appeals in the instant cases should be reversed.

Respectfully submitted,

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